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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for Himself and All Others Similarly Situated, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

An employer acting as a fiduciary purchased investments for an ERISA 401(k) savings plan rated AAA by Standard & Poor's and A+ by A.M. Best, but the investments did not perform as anticipated at the time of their initial selection.

The questions presented are these:

1. Under ERISA, are a fiduciary's investment decisions for such a plan properly subject to judicial review only for an abuse of discretion, or did the court of appeals erroneously employ a strict scrutiny standard?

2. Is a fiduciary required to republish to plan participants information already in the public domain, in order to satisfy ERISA's disclosure requirements?

3. Should ERISA generally be construed to require the most conservative investment decisions by fiduciaries thereby minimizing the expected return to plan participants, while likely causing an outflow of funds from the stock market and leading to higher interest rates?

LIST OF PARTIES AND RULE 29.6 LIST

The petitioners are Unisys Corporation; The Administrative Committee of the Unisys Savings Plan; the Investment Committee of the Unisys Savings Plan; Jack A. Blaine; John J. Laughlin; Kenneth L. Miller; David A. White; Stefan Riesenfeld; Michael R. Losey; Curtis A. Hessler; Edwin P. Gilbert; Thomas Penhale; Richard H. Bierly; Leon J. Level; Jack A. Blaine and George T. Robson Petitioners shall be collectively referred to as "Unisys."

The respondents are Richard Andujar, John H. Burgess, Jr., John J. Cieslicki, Richard Colby, James M. Collins, Alfred Contarino, Angel DiPietro, Engineers Union Local 444 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Joseph Fiore, James Gangale, Kenneth Goers, Carolyn A. Gohlike, Ronald Grippo, Michael Heck, Parker Kean, Nick Klemenz, Joseph Lau, Edward Lawler, Local 3, International Brotherhood of Electrical Workers, A.F.L.-C.I.O., Local 165 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 445 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 450 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 470 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., John Marcucci, Richard Mastrodomenico, Joseph McCarthy, Bernard McDevitt, James McLaughlin, John P. Meinhardt, Clarence Muller, Donald Rader, Richard Silver, Farouk M. Sos, Nadia F. Sos, Dennis C. Stanga, Peter Szczybek, William Torkildson, Gary Vala, Charles Wahler, and Henry Zylla. The individual plaintiffs represent a certified class of participants in the savings plans of the Unisys Corporation.

Unisys Corporation has no parent. Its subsidiaries, other than wholly-owned subsidiaries, are Nihon Unisys Ltd. and Oki Unisys Kaisha, Ltd.

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OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of summary judgment to petitioner Unisys on the issues raised in this petition is reported at 74 F.3d 420 (3d Cir. 1996), and is reproduced in the appendix attached hereto, "Pet. App." at 1a-53a. The district court's opinion, granting Unisys summary judgment on those same issues, is reported at 1995 WL 29048 (E.D. Pa. Jan. 26, 1995), and is reproduced in the appendix, Pet. App. at 60a-69a. The court of appeals' order denying Unisys' petition for rehearing is reported at 74 F.3d 420 (3d Cir. 1996), and is reproduced in the appendix, Pet. App. at 70a.

JURISDICTION

The judgment of the court of appeals was filed on January 4, 1996 (Pet. App. at 54a-59a), and a timely-filed petition for rehearing was denied by order dated February 6, 1996 (Pet. App. at 70a). This petition is being filed under Supreme Court Rule 13. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are sections 404(a), 404(c) and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001-1461, as amended, and are set forth in the appendix hereto (Pet. App. at 71a-72a).

STATEMENT OF THE CASE

Petitioners are the fiduciaries of the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement Investment Plan II (together the "Plan").[1] The Plan is a participant-directed defined contribution plan under ERISA sections 3(34) and 404(c), 29 U.S.C.A. §§ 1002(34), 1104(c). Because of the preferential tax treatment given participant contributions to their individual accounts under Internal Revenue Code section 401(k), such retirement plans are commonly referred to as "401(k) plans." These plans must be distinguished from defined benefit plans where participants are typically promised, upon retirement, a benefit in the form of a fixed percentage of their pre-retirement salary. *See* 29 U.S.C.A. § 1002(35). In a defined contribution plan (such as the Unisys Savings Plan), "employees are not promised any particular level of benefits; instead, they are promised only that they will receive the balances in their individual accounts." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990).

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1. The three plans were "identical" and, as such, will be together described as a singular plan. *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 426-27 (3d Cir. 1996)("*Unisys*")(Pet. App. at 11a).

The employee-investors, participants in defined contribution plans, not the fiduciaries, bear the risk of loss. Two commentators described the risk allocation in these plans:

> Defined contribution and defined benefit plans allocate investment risk oppositely. Under a defined contribution plan, the employee bears the burden of disappointing investment results and pockets the gains from good results. Under a defined benefit plan, the employer bears the investment risk. Since the employer has promised to provide benefits at a certain level, the employer remains liable to pay the benefits even if the fund turns up short.

Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. Chi. L. Rev. 1105, 1112-13 (1988).[2]

To facilitate the management of participants' investments, the Unisys Plan offered them the opportunity to direct their money to any of six varied investment options or "funds." Further, participants could, subject to certain restrictions, once each month transfer their money among these six funds. These funds had varying levels of risk and return and included the Diversified Fund, the Indexed Equity Fund, the Active Equity Fund, the Unisys Common Stock Fund, the Short Term Investment Fund, and the Insurance Contract Fund. The characteristics of the funds were described to participants in Plan prospectuses and summary plan descriptions.

In a six-month period, beginning in June 1987 and through January 1988, Unisys purchased three five-year "guaranteed investment contracts" as additional investments for the Sperry Fixed Income Fund and the Unisys Insurance Contract Fund.[3] Unisys bought GICs issued by the Executive Life

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2. *See also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988)(To impose upon plan sponsor investment risk in defined contribution plan "is an inequity of the heads I win, tails you lose variety that neither the ERISA statute nor the ... plan documents perpetrate.").

3. A guaranteed investment contract or "GIC" is a contract, issued by an insurance company, "under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contract." *Unisys*, 74 F.3d at 426 (Pet. App.

Insurance Company of California ("Executive Life"), then rated AAA and A+ by two nationally-recognized insurance ratings services, Standard & Poor's and A.M. Best, respectively. *Unisys,* 74 F.3d at 427 (Pet. App. at 12a). Executive Life was also licensed in all of the states where it transacted business. Over three years after the last Executive Life investment was made, and notwithstanding the fact that Executive Life had made all of the interim payments to the Plan, on April 11, 1991, California regulators imposed a conservatorship on Executive Life, the insurance equivalent of a Chapter 11 corporate reorganization. *Unisys,* 74 F.3d at 431 (Pet. App. at 19a).

Immediately thereafter, plaintiffs in these proceedings filed twelve ERISA class action complaints in the district courts of Minnesota and Pennsylvania, alleging that their Executive Life investments were a total loss. In fact, subsequent events have proven these predictions of total loss inaccurate. Executive Life was rehabilitated by the California Insurance Commissioner (subject to the supervision of the California courts) and, as such, the employee-investors have already recovered eighty-two percent of the amounts "frozen" at the time of the conservatorship. Moreover, it is not disputed that, upon the final liquidation of Executive Life's remaining assets, these employee-investors will have recouped approximately eight-five percent of their 1991 Executive Life investments.[4]

NOTES *(Continued)*

at 9a). The Unisys Savings Plan emerged from the merger of the Sperry Retirement Program — Part B and the Burroughs Employees Savings Thrift Plan. *Id.* (Pet. App. at 9a). Following the merger of the two plans, the Sperry fund ceased to accept new contributions, but proceeds from contracts in that fund were reinvested in the Unisys Insurance Contract Fund. *Id.* (Pet. App. at 10a).

4. Participants may well recover all of their Executive Life investments from the various state "guaranty" associations, obligated to reimburse any participant losses. *E.g., Unisys Corp. v. Pennsylvania Life and Health Ins. Guar. Assoc.,* 667 A.2d 1199 (Pa. Commw. Ct. 1995)(Pennsylvania resident plan participants entitled to guaranty coverage). Similar litigation is ongoing in a number of other state courts where participants also resided.

Following consolidation in the Eastern District of Pennsylvania, the parties engaged in discovery and motion practice, after which the district court granted Unisys' motion for summary judgment holding that the fiduciaries' selection of Executive Life GICs was based upon "solid, respectable and typical grounds." 1995 WL 29048, at * 4 (Pet. App. at 65a). Moreover, because the participants had adequate information from which to make informed choices regarding their investments, the district court ruled that, pursuant to ERISA section 404(c), 29 U.S.C.A. § 1104(c), the fiduciaries could not be held liable for the alleged losses. 1995 WL 29048, at * 3 (Pet. App. at 64a).

The Third Circuit reversed the district court's ruling and remanded the matter for trial. As to the initial investment, that court held that the prudence of Unisys' decision to purchase the Executive Life GICs could not be determined without a trial. *Unisys,* 74 F.3d at 434-37 (Pet. App. at 25a-32a). More specifically, the court held that the prudence of the fiduciaries' primary reliance on the insurance ratings services, in selecting the Executive Life GICs, could not be resolved on summary judgment. *Unisys,* 74 F.3d at 435-36 (Pet. App. at 26a-30a).

Moreover, the Third Circuit held that Unisys may rely on the exemption in ERISA section 404(c), 29 U.S.C.A. § 1104(c), in defense of the participants' claims. Section 404(c) recognizes that participants in such plans enjoy the right to direct their investments as they see fit and, further, excuses fiduciaries from losses associated with participant investment instructions. The Third Circuit ruled further that Unisys' disclosures to participants on the status of their investments must be evaluated independent of information then available in the public domain. *Unisys,* 74 F.3d at 443 (Pet. App. at 42a-43a). To determine whether Unisys had supplied participants adequate information regarding their investments, the court of appeals rejected Unisys' argument that the participants are charged with knowledge of the publicly-available information on their investments. In other words, and equally troubling for plan administrators, the Third Circuit's ruling requires defined contribution plan fiduciaries somehow to collect and to assess

and then to re-publish public information on each of the many hundreds of investments that comprise a typical 401(k) plan portfolio.

REASONS FOR GRANTING THE WRIT

A.

The court of appeals held that ERISA permits federal courts to second guess fiduciary investment decisions employing a strict scrutiny standard. As such, the Third Circuit's ruling on the threshold investment decision squarely raises the issue left open in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *i.e.*, whether fiduciary decisions, *e.g.*, investment choices, should be scrutinized under the "arbitrary and capricious standard." Because this issue appears to have been finally determined by this Court's recent decision in *Varity Corp. v. Howe*, No. 94-1471, 1996 U.S. LEXIS 1954 (U.S. March 19, 1996), decided after the Third Circuit's decision in *Unisys*, this Court should grant this petition and summarily reverse the court of appeals' judgment on the authority of its own intervening decision in *Varity*. If *Varity* does not supply the controlling rule of law, a split in applicable courts of appeals authority nonetheless requires this Court's review.

The *Unisys* opinion also directly conflicts with then Judge Scalia's opinion in *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 961-65 (D.C. Cir. 1985)(Scalia, J., concurring in part and dissenting in part), which established a deferential standard of review of fiduciaries' investment choices. *Fink* and its courts of appeals progeny hold that ERISA's causation requirements compel the dismissal of fiduciary breach claims where, as here, there is indisputable objective evidence of the prudence of the fiduciary's actions.

1.

The Plan documents here granted the Unisys fiduciaries substantial discretion in making the initial investment choices,[5]

5. The Plan prospectus explained to participants the discretion enjoyed by the fiduciaries:

and ERISA recognizes that discretion is the hallmark of fiduciary activity. *See* 29 U.S.C.A. § 1002(21)(A)(i). The lower court rejected all pretense of fiduciary discretion and ordered the district court to apply a strict scrutiny standard to evaluate the fiduciary's conduct. *Unisys*, 74 F.3d at 433-37 (Pet. App. at 43a-51a). The lower court's ruling squarely presents the issue whether the federal courts should second guess fiduciary conduct rather than apply this Court's deferential standard of review mandated by *Varity*.

In *Firestone*, this Court instructed the lower courts to apply a deferential standard of review to assess denials of ERISA benefits:[6]

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. *See* Restatement (Second) of Trusts § 187 (1959) ("[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion").

The Administrative Committee has the exclusive right to interpret the Plan and to decide matters arising under the Plan except for those matters which are designated by the Plan as the responsibility of the Investment Committee. The Investment Committee has the exclusive right to direct the trustee of the Plan (the "Trustee") with respect to investment of the assets of the Plan, to remove and appoint successor Trustees of the Plan, to establish or terminate investment funds, and to select and terminate investment managers. The Trustee is responsible for the supervision or investment of Plan assets, subject to the direction or approval of the Investment Committee or investment managers and subject to the terms of the Plan.

6. This Court's opinion in *Firestone* was limited to the standard governing judicial review of benefits claims under ERISA section 502(a)(1)(B):

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

Firestone, 489 U.S. at 108.

Firestone, 489 U.S. at 111.[7]

Consistent with *Firestone*, and recognizing the discretion enjoyed by the fiduciaries under the Plan, Unisys' actions should be reviewed under the "arbitrary and capricious" standard.

This Court's recent *Varity* opinion holds that the deferential standard applied to ERISA benefits claims should also be applied to the resolution of fiduciary breach claims. Responding to the argument that to allow individual remedies for fiduciary breaches under 29 U.S.C.A. § 1132(a)(3) would yield more fiduciary breach claims, with a more exacting standard of review, this Court held that the abuse of discretion standard also applies to fiduciary breach claims:

> [C]haracterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits. *After all, Firestone, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.*

Varity, 1996 U.S. LEXIS 1954, at * 45 (emphasis added). On the authority of *Varity* alone, read in light of the discretion granted to the fiduciaries (*see supra* at 6-7 n. 5), this Court should reverse the *Unisys* opinion and require application of a deferential standard of review.

Even if *Varity* is not deemed controlling, conflict and confusion among the courts of appeals on the governing standard necessitates this Court's review. In essence, the *Unisys* opinion holds that the fiduciaries' investment decision in Executive

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7. The commentary to section 187 of the *Restatement (Second) of Trusts*, the section relied on in *Firestone*, extends this discretionary authority to investment decisions. *See Restatement (Second) of Trusts* § 187, comment c (1959)(The discretionary authority "is applicable not only to powers to lease, sell or mortgage the trust property *or to invest trust funds*, but also to powers to allocate the beneficial interest among various beneficiaries, to determine the amount necessary for a beneficiary's support, or to terminate the trust.")(emphasis added).

Life should be scrutinized consistent with general prudence standards. *Unisys*, 74 F.3d at 435-36 (Pet. App. at 28a-29a). The lower court failed to address, however, *Unisys*' argument that, after *Firestone*, a deferential standard of review is appropriate. The *Unisys* ruling thus essentially requires the application of a "strict scrutiny" standard to evaluate the fiduciaries' actions.

The Third Circuit's failure to adopt a deferential standard of review in these circumstances conflicts with the First Circuit's opinion in *Mahoney v. Board of Trustees,* 973 F.2d 968, 971-73 (1st Cir. 1992), rejecting a "strict standard of review" because " '[w]here discretion is conferred upon the trustee with respect to the exercise of a power . . . the trustee's 'exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' "[8]

Indeed, another panel of the Third Circuit, ruling in the ESOP context, followed *Firestone*, and held that the arbitrary and capricious standard should apply to fiduciary breach litigation:

> [W]e believe that after *Firestone*, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C.A. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a). After all, section 1104(a) also abounds with the language of trust law, and the Supreme Court previously has noted that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."

Moench v. Robertson, 62 F.3d 553, 565 (3d Cir. 1995)(quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.,* 472 U.S. 559, 570 (1985)), *cert. denied,* 116 S.Ct. 917 (1996).[9]

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8. Quoting *Restatement (Second) of Trusts* § 186.

9. Unisys asked the Third Circuit to consider the impact of *Moench* on this dispute, pursuant to Fed. R. App. P. 28(j) and in its rehearing petition; nevertheless, that court did not do so.

The Second Circuit has, on the other hand, limited *Firestone* to the judicial review of benefits claims under ERISA section 502(a)(1)(B):

> We reject the argument that *Firestone*'s arbitrary and capricious standard applies to [defendants'] conduct in this matter. *Firestone* involved the denial of benefits, and the Court stated that if the terms of the plan accorded the administrator discretion in such matters, the decision should be upheld unless arbitrary and capricious. *However, we decline to apply the arbitrary and capricious standard to the fiduciary conduct at issue because this case does not involve a simple denial of benefits, over which the plan administrators have discretion.*

John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan, 26 F.3d 360, 369 (2d Cir. 1994) (emphasis added).

Assuming *Varity* does not control, this Court should grant this petition to determine the appropriate standard of review applicable to fiduciary breach claims under ERISA, and to resolve this conflict among the First, Second and Third Circuits.

2.

The *Unisys* opinion also conflicts with those courts of appeals decisions holding that ERISA's causation requirement, section 409 of ERISA, 29 U.S.C.A. § 1009, similarly compels application of a deferential standard of review to challenges to fiduciary investment decisions. This approach, dubbed the "hypothetical prudent fiduciary" analysis, recognizes the deference owing fiduciaries under ERISA. After describing the reasonable prudent fiduciary standard applied to investment choices, then Judge Scalia, concurring and dissenting in *Fink,* observed that a second step is needed to resolve the fiduciary breach claim. ERISA's causation requirement, contained in section 409, compels a further inquiry into whether there is objective evidence of prudence. In such circumstances, a fiduciary cannot be held liable in damages:

> I know of no case in which a trustee who has happened — through prayer, astrology or just blind luck — to make (or hold) objectively prudent investments (*e.g.*, an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink, 772 F.2d at 962. The Eighth Circuit, building on Judge Scalia's opinion in *Fink*, explained further:

> Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.

Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 919 (8th Cir. 1994).[10] Both *Fink* and *Roth* directly conflict with *Unisys* on the judicial standard governing a fiduciary's investment decision and, as such, this Court's review of *Unisys* is needed. As discussed immediately below, there was an abundance of objective evidence suggesting the prudence of *Unisys*' investment decision.

3.

The standard of review applied to fiduciary breach claims will affect not only whether such litigation is brought, but the outcome of any such litigation. As Unisys explained to the court below, both the Department of Labor and the Pension Benefit Guaranty Corporation ("PBGC"), during the relevant time period, established a flexible standard for the purchase of insurance annuities upon the termination of a defined benefit pension plan, pursuant to ERISA section 4041(b)(3)(A)(i), 29

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10. *See also Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)("[A] fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable.")(emphasis in original); Note, *Must We Teach Abstinence? Pensions' Relationship Investments and the Lessons of Fiduciary Duty*, 94 Colum. L. Rev. 2222, 2248 n.118 (1994)("Judge Scalia (as he was then) argued in dissent [in *Fink*] that a breach of the duty to investigate had meaning only to the extent it caused a losing bet on a substantively poor investment. . . . Scalia's seems the better position.").

U.S.C.A. § 1341(b)(3)(A)(i). In that context, to satisfy an individual's pension benefit from one insurance company for his lifetime, both of these regulatory agencies required only that the insurance company selected be state licensed. *See* 29 C.F.R. §§ 2617.2, 2617.4, 2617.22(d)(8)(PBGC standard)(1995); 29 C.F.R. § 2510.3-3(d)(2)(ii)(A)(1)(DOL standard)(1995). These standards apply notwithstanding the fact that the fiduciaries typically face a conflict of interest in such circumstances, *i.e.,* they stand to recoup any available pension plan surplus after purchase of the annuity. *E.g., Riley v. Murdock,* 890 F. Supp. 444, 458-59 (E.D.N.C. 1995)(purchase of Executive Life annuities ancillary to termination of defined benefit pension plan not a breach of fiduciary obligation, even if selection of annuity maximized reversion of plan surplus).

Aside from the fact that Executive Life was licensed by the State of California (and all states where it transacted business), it had, at the time of *Unisys*' purchase, an AAA rating from Standard & Poor's and an A+ rating from A.M. Best. *Unisys*, 74 F.3d at 427 (Pet. App. at 12a). In fact, state regulation of the insurance industry typically requires the "guaranty" of these benefits, by state insurance guaranty associations. *E.g., Unisys Corp. v. Pennsylvania Life and Health Ins. Guar. Assoc.,* 667 A.2d 1199 (Pa. Commw. Ct. 1995). Moreover, it is undisputed that no conflict of interest arose with the purchase of the Executive Life GICs, and Executive Life was but one of many insurers in the Plan's portfolio.

Proper application of a deferential standard of review would likely have absolved Unisys from plaintiffs' claim to damages, without the need for a trial. This Court should grant *Unisys*' petition to resolve this important issue to the administration of defined contribution pension plans, and of equal importance to the resolution generally of fiduciary breach claims under ERISA.

B.

The Third Circuit's opinion requires defined contribution plan fiduciaries to re-transmit publicly-available information on the status of participants' investments. This aspect of

Unisys runs counter to the Department of Labor's explicit regulatory command excusing fiduciaries from such an obligation. Indeed, by tying this obligation to ERISA section 404(a), the Third Circuit has unwittingly supplanted the Department's detailed regulatory scheme for such plans. *See* 57 Fed. Reg. 46906-937 (1992). In effect, the *Unisys* opinion requires defined contribution plan fiduciaries to run a "clipping service" for participants, collating and re-broadcasting the multitude of public information on plan investments, a judicially-cobbled duty drawn from ERISA's general fiduciary obligation to act prudently.[11]

In reaching this conclusion, the court of appeals went beyond section 404(c), to the general prudence obligations of section 404(a), to define the fiduciary's disclosure obligations in administering plans governed by 404(c). Building upon a line of unrelated Third Circuit fiduciary disclosure cases construing the prudence standard of section 404(a),[12] the court of appeals reached the alarming conclusion that *Unisys* was obligated to broadcast to participants public information on the status of their investments, limited only by the materiality standard apparently borrowed from federal securities law:

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11. Unisys collected for the Third Circuit a sample of the public materials then available on Executive Life, from such sources as the *Wall Street Journal, Forbes, The New York Times, The Los Angeles Times, The San Francisco Chronicle,* the United Press International and the Associated Press. According to the court of appeals, "[d]uring this time, Executive Life's condition was widely reported in the financial press." *Unisys*, 74 F.3d at 431 (Pet. App. at 19a).

12. The opinions from which the Third Circuit's new rule was derived do not address the circumstances unique to the administration of defined contribution pension plans. *Unisys*, 74 F.3d at 440-41 (Pet. App. at 38a). *See Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995)(modifications to retirement medical plan), *cert. denied*, 116 S.Ct. 1316 (1996); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994)(claims for life insurance and accidental death and dismemberment benefits); *Bixler v. Central PA Teamsters Health and Welfare Plan*, 12 F.3d 1292 (3d Cir. 1993)(participant inquiries regarding medical benefits); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.)(early retirement "window" afforded defined benefit pension plan participants), *cert. denied*, 114 S.Ct. 622 (1993).

> In our view, while Unisys was not obligated to share with participants everything it knew about GICS and Executive Life, it was obligated to impart to participants material information of which it had knowledge that was sufficient to apprise the average plan participant of the risks associated with investing in the Fixed Income and Insurance Contract Funds in view of the purchases of the Executive Life GICs and the financial condition Executive Life presented in 1990. *Moreover, in this regard, we do not, as Unisys urges, distinguish between "public" and "non-public" information nor do we limit Unisys' duty to disclose to the latter.*

Unisys, 74 F.3d at 443 (Pet. App. at 43a) (emphasis added).

The lower court's opinion is directly at odds with the Department of Labor's 404(c) regulations. To keep defined contribution plan administrative costs down, the regulations explicitly relieve fiduciaries of the disclosure obligation announced in *Unisys*. Under the regulations, a participant's exercise of control under ERISA section 404(c) will not be deemed "independent" if:

> (ii) *A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary,* unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by [ERISA] . . . .

29 C.F.R. § 2550.404c-1(c)(2)(ii)(1995)(emphasis added). Incredibly, and notwithstanding this regulatory guidance, the lower court's ruling requires fiduciaries to locate, collect, interpret, and disseminate publicly-available information on the

status of plan investments.[13] The governing regulation requires only that fiduciaries not "conceal" information already in their possession.

Admittedly, the 404(c) regulation, by its terms, does not apply to this case. 29 C.F.R. § 2550.404c- 1(g)(1)(1995)("[T]his section is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after October 13, 1992."). Nevertheless, the regulatory limitation requiring the disclosure only of "material non-public information" is of no consequence in the wake of the *Unisys* opinion. By grounding the disclosure obligation in section 404(a), as opposed to 404(c), the *Unisys* holding applies equally to fiduciary conduct arising before and after the effective date of the regulations. In other words, fiduciaries must somehow now harmonize the Third Circuit's opinion, grounded in section 404(a), and the Department of Labor's section 404(c) regulation. Because the two approaches are irreconcilable, the fiduciaries must either adhere to the *Unisys* ruling (at tremendous cost), or terminate the plan.

Moreover, these judicially-constructed disclosure requirements exceed those required under the federal securities laws. It is a basic principle of corporate law that a corporation's directors owe fiduciary duties to the corporation's stockhold-

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13. In so holding, the *Unisys* opinion ignores this Court's repeated admonition that ERISA cannot be construed to create new rights and obligations, absent an explicit congressional directive. *E.g., Mertens v. Hewitt Assoc.*, 508 U.S. 248, 261 (1993)("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.")(emphasis in original); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)("This 'blue pencil' method of statutory interpretation — omitting all words not part of the clauses deemed pertinent to the task at hand — impermissibly ignores the relevant context in which statutory language subsists."). Prior to *Unisys*, all assumed that a 404(c) plan fiduciary need not look beyond that section to discern its responsibilities in administering such a plan. *E.g.*, ABA Section of Labor and Employment Law, *Employee Benefits Law* 293 (Steven J. Sacher, *et al.*, eds. 1991)("A significant exception to the rules governing fiduciaries applies to individual account plans that permit participants or beneficiaries to exercise control over assets in their account.").

ers. *Pepper v. Litton*, 308 U.S. 295 (1939).[14] Despite this fiduciary relationship, the federal securities laws do not require the dissemination of already-public information regarding a corporation's securities. *Sailors v. Northern States Power Co.*, 4 F.3d 610, 613 (8th Cir. 1993)("The securities laws require disclosure of information *that is not otherwise* in the public domain.")(emphasis added)(quoting *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1323 (7th Cir. 1988)); *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 212 (4th Cir. 1994) (same).[15] While corporate law and ERISA share the same fiduciary underpinnings, the Third Circuit has, without any basis in law or logic, announced a much more stringent standard governing disclosures for investments held on behalf of participants in ERISA plans.

The practical effect of the ruling is to require fiduciaries to keep participants abreast of the status of the hundreds, if not thousands, of investments in a typical 401(k) plan (at a

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14. "A director is a fiduciary." *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 588 (1875). So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492 (1919). Indeed, the Third Circuit's disclosure requirements run counter to this Court's holding in *International Bhd. of Teamsters, Chauffeurs, Warehousers & Helpers v. Daniel*, 439 U.S. 551 (1979). *Daniel* emphasized the particularized nature of the disclosures required under ERISA, as opposed to federal securities laws:

> Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, . . . in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts . . . .

Id. at 569 (citations omitted).

15. The *Sailors* court traced the origin of the principle, that public information need not be disclosed, to this Court's opinion in *Shapiro v. Goldberg*, 192 U.S. 232, 241-42 (1904), which stated: "When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them . . . he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor." *Id.* This rule is also implicit in this Court's holding in *Basic, Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988), that the presumption of fraud is rebutted when the market has access to accurate information.

time when regulatory burdens already threaten the availability of these plans). As one commentator has opined:

> Section 404(c) might not be the safe harbor most defined contribution plan sponsors think it is, a federal appeals court decision suggests. The decision — involving Unisys Corp. — also suggests the entrance to the safe harbor is far more difficult to navigate than most employers understand.

Patricia B. Limbacher, *404(c) Rules Harbor May Not Be So Safe,* Pension & Investments, Jan. 22, 1996, at 1. *See also* Ellen E. Schultz, *So Your 401(k) Had a Loss? Try Suing Your Boss,* The Wall St. J., Feb. 16, 1996, at B1, B3 ("The [*Unisys*] case, one of the first of its kind, worries employers, who fear it will lead to a sea of lawsuits."). To so engraft on section 404(c) duties derived from section 404(a) will, contrary to the legislative intent, dramatically drive up the costs of administering such a plan, while undermining, if not eliminating, the availability of the statutory 404(c) defense.

C.

The uncertainty created by the courts of appeals' confusion on the governing standard of review threatens both general economic disruption and the financial soundness of retirement planning for millions of Americans. Without the benefit of the deference owing under ERISA, recognized by this Court in *Varity*, fiduciaries will likely offer only more conservative investments in 401(k) pension plans. Such risk-averse investments will provide the only effective "safe harbor" for employers desirous of avoiding fiduciary liability, rather than seeking to maximize their employees' retirement savings and income. Moreover, the outflow of dollars from growth-oriented into "risk free" investments may derail current stock market trends and cause interest rates to rise as retirement funds gravitate to government and other fixed rate investment vehicles.

The Third Circuit's holding makes likely the occurrence of these events not directly, but indirectly, by construing too

narrowly the statutory exemption from fiduciary liability and thereby shifting the investment risk to employers and away from employees, all in contravention of ERISA. Indeed, employers will follow the path described, rather than undertake to comply with the court of appeals' holding, particularly as employers struggle to disclose to pension plan participants public information on the status of 401(k) savings plan investments, as the Third Circuit now requires.

The importance of the issues in this petition cannot be overstated. Defined contribution pension plans have enjoyed phenomenal growth in the last ten years, eclipsing the use of defined benefit plans to offer the potential for retirement income to retirees:

> Since the mid 1970s, the private pension system in the United States has undergone considerable change. The most notable development has been the increasing reliance on defined contribution plans over the traditional defined benefit plans. Between 1980 and 1985 alone, the number of primary defined contribution plans increased by 71 percent and the number of participants rose by 83 percent; in contrast, primary defined benefit coverage showed virtually no growth.

Robert L. Clark and Ann A. McDermed, *The Choice of Pension Plans in a Changing Regulatory Environment* 1 (American Enterprise Institute for Public Policy Research 1990).

Given the relationship between such plans and securities markets, the Third Circuit's ruling may have untoward consequences for the nation's economy. After *Unisys*, fiduciaries will likely limit the availability of equity offerings to participants, in favor of "safer" fixed income investments, typically money market funds and government securities. Such an exodus of capital from equities to fixed income investments may curtail recent equity market trends, while causing a rise in interest rates. *Cf.* Cynthia Mayer, *Bull Market May Just Go On and On,* Philadelphia Inquirer, March 3, 1996, at D1 ("Mutual

funds now control 13 percent of all equities, and a whopping 35 percent of those stocks are held in retirement funds.").[16]

Moreover, added limitations on the availability of equity investments to defined contribution plan participants may further undermine employees' ability to amass sufficient savings for retirement. In other words, the *Unisys* opinion may cause fiduciaries to limit the availability of more aggressive investment options, at a time when all recognize that participant choices have been far too conservative. To date, 401(k) participants have generally opted for conservative investments, potentially to their detriment:

> Employees are not investing wisely. Unlike professional investment managers who invest in diversified common stocks, most 401(k) savers invest in overly conservative money market funds, government bonds or their own company's stocks. Such strategies are poor when it comes to maximizing returns and achieving diversification.

John E. Petersen, *We're Ill-equipped to Run Our Own Retirement Plans,* Houston Chronicle, April 3, 1995, at 15. *See also* Leslie Wayne, *Pension Changes Raising Concerns,* N.Y. Times, Aug. 29, 1994, at A1 ("In contrast to the professional money managers who invest for a traditional pension plan, many workers continue to shun stocks, the investment that has best outpaced inflation during the last 50 years. Instead, many favor lower-yielding investments like money market funds that may not provide enough for their future needs.").[17] Moreover,

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16. *See also* Fred Williams, *Managers Hold Firm in Soaring Markets,* Pensions & Investments, Feb. 19, 1996, at 1 ("After 1995's bloated 37.48% return for the Standard & Poor's 500 Stock Index, the stock market is being fueled by massive liquidity from mutual funds and 401(k) plans ...."); James M. Poterba, Steven F. Venti & David A. Wise, *Do 401(k) Contributions Crowd Out Other Personal Saving?,* 58 J. of Public Economics 1, 5 (1995)("By 1991 almost one-quarter of all families participated in a 401(k)."); U.S. Dept. of Labor/Pension and Welfare Benefits Admin., Private Pension Plan Bulletin, *Abstract of 1991 Form 5500 Annual Reports* 3 (No. 4, Winter 1995)("The major factor in the higher growth of DC [defined contribution] plan assets has been a continuing positive cash inflow of contributions minus benefit payouts, which in 1991 amounted to $17 billion.").

17. According to another financial commentator, fixed-income invest-

to impress additional costs on defined contribution plan sponsors and fiduciaries may result in the curtailment of the availability of such plans, particularly among smaller employers. *Cf.* Christine Williamson, *Plan Execs Oppose 401(k) Audit Effort,* Pensions & Investments, Dec. 11, 1995, at 3 ("One reason so many U.S. workers aren't covered now by 401(k) plans is the cost and the complexity of complying with existing regulations.").[18] The *Unisys* opinion may have far reaching consequences for our nation's economy generally, and participants' ability to amass sufficient money for retirement.

NOTES *(Continued)*

ments pose a hidden risk to defined contribution plan participants:

> The no-growth risk: More than 40% of the money that workers contribute to their 401(k)s is interred in investments that pay steady interest but don't allow their principal to grow .... This includes fixed-income contracts, money-market funds and bond mutual funds. Inexperienced investors think their money is safe. But safe from what? They're overlooking the certain risk that inflation will gobble up their returns. After taxes (which they'll pay when they draw the money out), their purchasing power will hardly have grown at all.

Jane Bryant Quinn, *Employees Should Learn to Be Better Investors,* Rocky Mountain News, Sept. 26, 1994, at 40A.

18. Indeed, the mischief of the *Unisys* opinion will extend beyond the borders of the Third Circuit. ERISA's expansive jurisdictional provision allows for suit wherever a defendant "may be found" or where the "breach took place." 29 U.S.C.A. § 1132(e)(2)(West 1985). Hence, future plaintiffs, by suing in the Third Circuit, may readily circumvent unfavorable circuit authority elsewhere, so long as the defendant is found to have minimum contacts with the Third Circuit (an easy task given the number of Delaware corporations) or the plaintiff resides there. *E.g., Varsic v. United States District Court,* 607 F.2d 245, 248 (9th Cir. 1979)("Congress' choice of this term ['found'] for inclusion in the ERISA venue provision further supports our conclusion that the provision is intended to expand, rather than restrict, the range of permissible venue locations."); *see also Bonin v. American Airlines, Inc.,* 621 F.2d 635, 636 n.1 (5th Cir. 1980)("A potential ERISA plaintiff is granted a wide choice of federal court venue ....").

CONCLUSION

Based on the foregoing, petitioners request that the Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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